IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| BETTY HAMAL and JOHN HAMAL, | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | Case No. 16-cv-10159 |
| | ) | |
| SETERUS, INC., | ) | Honorable Sharon Johnson Coleman |
| | ) | Judge Presiding |
| Defendant. | ) | |

**MEMORANDUM IN SUPPORT OF SETERUS'S**
**MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

Defendant Seterus, Inc. ("Seterus"), by its attorneys, submits the following Memorandum in Support of its Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) the complaint ("Complaint") filed by Plaintiffs, Betty Hamal and John Hamal (collectively, "Plaintiffs").

## Introduction

Plaintiffs do not and cannot allege a valid cause of action against Seterus arising from the facts alleged in their Complaint, and therefore, the Complaint should be dismissed in its entirety pursuant to Rule 12(b)(6).

This matter arises out of a mortgage loan ("Subject Loan") extended to the Plaintiffs and previously serviced by Seterus which was secured by a mortgage against property "owned" by the Plaintiffs. *See* Compl., ¶¶ 4, 9.

Based upon various alleged errors in the servicing of the Subject Loan, Plaintiffs attempt to allege violations of the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA") and the federal Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* ("FCRA"). *See generally, id.*

More specifically, Count I of Plaintiffs' Complaint alleges Seterus violated the FDCPA by making false representations to Plaintiffs as to the amounts owed under the Subject Loan and by communicating directly with Plaintiffs despite actual knowledge they were represented by counsel. *Id.*, at ¶¶ 26-30. Count II of Plaintiffs' Complaint claims Seterus violated the FCRA by purportedly incorrectly reporting the Subject Loan as delinquent to credit reporting agencies. *Id.*, at ¶¶31-34

As explained in greater detail below, Plaintiffs' allegations against Seterus fail to allege any valid cause of action under the FDCPA or FCRA. Briefly, their FDCPA claims fail as a matter of law because the Plaintiffs do not and cannot allege facts to establish that the Subject Loan is a "debt" as defined by the FDCPA. Similarly, Plaintiffs' attempts to allege a claim arising under the FCRA fail because they do not and cannot allege that they provided notice of a dispute to the credit reporting agencies as required. These defects are material and cannot be cured.

Indeed, the deficiencies in the Plaintiffs' claims are so glaringly obvious that the only conclusion can be that these claims were brought for improper purposes, and sanctions should be imposed against the Plaintiffs and their attorneys pursuant to 15 U.S.C. § 1692k(a)(3) and 28 U.S.C. § 1927.

Accordingly, this Court should dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) with prejudice and without leave to amend, and award Seterus its reasonable attorneys' fees and costs.

**Background**

On or about, January 12, 2010, Bank of America, N.A. ("BANA") extended the Subject Loan to "John K. Hamal and Betty Hamal, Trustees of the Hamal Living Trust dated May 13, 1999" which was secured by a mortgage ("Subject Mortgage") against the real property commonly known as 4111 West Lake Avenue in Glenview, Illinois 60025 ("Subject Property"). *See* Compl., ¶¶ 1, 9. A true and accurate copy of the Subject Mortgage is attached hereto as Exhibit A. *See e.g., Merlyn McNeal v. J.P. Morgan Chase Bank, N.A.,* Case No. 16 CV 3115, 2016 U.S. Dist. Lexis 159561, *3 (N.D. Ill. Nov. 17, 2016) (taking judicial notice of documents central to a complaint and referenced therein but which plaintiffs' fail to attach as exhibits); *Dasilva v. CitiMortgage, Inc.,* Case No. 12 C 13, 2012 U.S. Dist. LEXIS 150505, *10 n. 4 (N.D. Ill. Oct. 19, 2012) (taking judicial notice of mortgage and note at issue in evaluating plaintiff's FDCPA claims).

Apart from the conclusory allegation that the Subject Loan was "made for personal, family, and household purposes" (Compl., ¶ 27), nowhere do the Plaintiffs' allege any facts to support this claim. *See generally, id.* Tellingly, Plaintiffs merely allege that they "owned the [Subject Property]" as opposed to using the Subject Property as their residence. *Id.,* Compl., ¶ 4. Further, the Subject Mortgage includes a "1-4 Family Rider (Assignment of Rents)" typically included in mortgages covering investment property and which explicitly deletes the requirement that the Plaintiffs' reside in the Subject Property. *See* Subject Mortgage (Ex. A hereto), at "Family Rider" ¶ F. Similarly, the correspondence attached to the Complaint as Exhibit C purportedly from Seterus to the Plaintiffs is addressed not to the Subject Property, but to the Plaintiffs at "4115 West Lake Avenue, Glenview, Illinois 60025." *See* Correspondence dated February 15, 2016 (Ex. C to Complaint).

In support of their purported claims, Plaintiffs allege various errors which occurred while the Subject Loan was being serviced by BANA. In early 2014, BANA purportedly paid the real estate taxes for the Subject Property in error. *Id.*, ¶ 13. In addition, BANA purportedly misapplied a payment to the Subject Loan account that was intended for a distinct and separate mortgage loan account that Plaintiffs also held with BANA. *Id.*, ¶ 10. The misapplied payment allegedly resulted in a surplus payment credited to the Subject Loan. *Id.*

On or about September 30, 2014, the servicing of the Subject Loan transferred from BANA to Seterus. *Id.*, ¶ 12. Notably, the errors alleged by Plaintiffs on the Subject Loan occurred prior to the service transfer date. However, as alleged by Plaintiffs, in May of 2015, BANA corrected the misapplied payment error. *Id.*, ¶ 15. Plaintiffs allege that despite the correction by BANA, Seterus considered the Subject Loan account delinquent due to the deduction of the misapplied payment from the account. *Id.*, ¶ 16. Plaintiffs further allege Seterus did not correct the error in its system cause by the deduction of the misapplied payment and made repeated phone calls to the Plaintiffs seeking to collect on the purported debt until November of 2015. *Id.*, ¶¶ 17, 19, 24.

In support of their FCRA claim, Plaintiffs allege Seterus reported the purported delinquency of the Subject Loan account to credit reporting agencies ("CRAs") which negatively impacted their credit score. *Id.*, ¶¶ 22-23. However, the Complaint is devoid of any allegation that the Plaintiffs submitted any dispute to the CRAs notifying them of the purported errors in the credit reporting on the Subject Loan. *See generally, id.*

**Standard of Review**

To withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint "must contain allegations that 'state a claim to relief that is plausible on its face.'" *See, e.g., McCauley v. City of Chicago,* 671 F. 3d 611, 615 (7th Cir. 2011). "A claim has a facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

The plaintiff must "provide some specific facts to support the legal claims asserted in the complaint." *McCauley*, 671 F. 3d at 616. In evaluating a motion to dismiss, the court must consider "the complaint itself, documents attached to the complaint, documents that are critical to the complaint and referred to in it, and information that is subject to proper judicial notice." *Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012); *McNeal*, 2016 U.S. Dist. 159561 *3 ("A plaintiff cannot thwart consideration of a relevant, central document by failing to attach or reference it.")

## Argument

### I. Plaintiffs Cannot Adequately Plead a Claim under the FDCPA against Seterus.

Plaintiffs fail to adequately allege that the Subject Loan is a "debt" pursuant to the FDCPA. Instead, Plaintiffs merely assert these requisite elements in conclusory fashion, and as demonstrated below, Count I of the Complaint should be dismissed for these reasons.

Sections 1692e and 1692f of the FDCPA prohibits certain activities "in connection with the collection of any debt." *See* 15 U.S.C. §§ 1692e and 1692f. The term "debt" is defined in the FDCPA as any obligation of a consumer to pay money arising out of a transaction "primarily for personal, family, or household purposes." *See* 15 U.S.C. § 1692a(5).

Courts across the country have consistently held that "actions arising out of commercial debts are not covered by the protective provisions of the FDCPA." *See First Gibraltar Bank, FSB v. Smith*, 62 F.3d 133, 135-36 (5th Cir. 1995); *Slenk v. Transworld Sys., Inc.*, 236 F.3d 1072, 1074 (9th Cir. 2001) (finding that the FDCPA "applies to consumer debts and not business loans"); *Staub v. Harris*, 626 F.3d 275, 278 (3rd Cir. 1980) ("collection of commercial accounts is beyond [the FDCPA's] coverage]"); *Green-Stevenson v. Bank of Am., N.A.*, 2014 U.S. Dist. LEXIS 186937, at *3 (E.D.N.Y. 2014) ("The FDCPA claims fail because the debt was incurred for business purposes"); *Shapiro v. Haenn*, 222 F. Supp. 2d 29, 40 (D. Me. 2002) ("the FDCPA 'applies to consumer debts and not business loans'"). Courts in the Seventh Circuit have reached the same conclusion. *See, e.g.*, *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.*, 214 F.3d 872, 875 (7th Cir. 2000); *Vasilakos v. Blitt & Gains, P.C.*, Case No. 12 C 5526, 2013 U.S. Dist. LEXIS 112228, at *8-9 (N.D. Ill. Aug. 8, 2013); *Glamour Girlz, LLC v. D.M. Merch., Inc.*, Case No. 12 C 4307, 2012 U.S. Dist. LEXIS 135865, at *4 (N.D. Ill. Sept. 24, 2012); *Forgeron v. Hough*, Case No. 10 C 6298, 2011 U.S. Dist. LEXIS 82928, at *16 (N.D. Ill. July 26, 2011); *Isaacson v. SABA Commer. Servs. Corp.*, 636 F. Supp. 2d 722, 725 (N.D. Ill. 2009).

Similarly, courts have uniformly determined that mortgage loans extended for and secured by rental or investment properties are considered commercial or business purposes, and therefore, not "debts" under the FDCPA. *See e.g.*, *Klahn v. Clackamas County Bank*, 2013 U.S. Dist. LEXIS 103524, at *12 (D. Or. 2013) ("a debt associated with rental properties or for investment purposes is not considered a consumer debt under the FDCPA"); *Alexander v. SunTrust Mortgag., Inc.*, 2015 U.S. Dist. LEXIS 27038, at *11-12 (M.D. Fla. 2015) ("[FDCPA] statutes do not apply to the investment property involved herein"); *Fleet Nat'l Bank v. Baker*, 263 F. Supp. 2d 150, 153 (D. Mass. 2003) (FDCPA did not apply because "the debt in question is not a consumer debt"); *Edwards v. Ocwen Loan Servicing, LLC*, 24 F. Supp. 3d 21 (D.D.C. 2014) ("loans for rental and investment properties are not FDCPA 'debts.'"); *Afkinfaderin-Abua v. Dimaiolo*, Case No. 13-cv-3451, 2014 U.S. Dist. LEXIS 11408, at *8 (D. N.J. Jan. 29, 2014) (collecting cases in which the courts held that the "FDCPA does not apply to debts associated with investment properties"); *Kitamura v. AOAO of Lihue Townhouse*, Case No. 12-00353, 2013 U.S. Dist. LEXIS 45535, at *13 (D. Haw. Mar. 29, 2013) (collecting cases).

Here, Plaintiffs merely allege that they are "'consumers' as defined under the FDCPA, 15 U.S.C. § 1692(a)(3)." *See* Compl., ¶ 5. Plaintiffs also allege Seterus was "attempting to collect on a consumer debt as defined under 15 U.S.C. § 1692(a)(5)." *Id.*, ¶ 8. However, this Court is not required to accept Plaintiffs' bare legal conclusion as true when considering a motion to dismiss. *McCauley v. City of Chicago*, 671 F. 3d 611, 616 (7th Cir. 2011) (complaint must allege specific facts to support claims alleged).

Despite Plaintiffs' conclusory allegations the Subject Loan was "made for personal, family, and household purposes" they fail to allege – because they cannot – any facts to support that determination. *See e.g., Edwards*, 24 F. Supp. 3d at 27 (dismissing claims under the FDCPA after determining that the plaintiff's "repeated recitations of the statutory language [citations to record omitted] without more, are insufficient to allege that her mortgage loan meets the FDCPA's definition of a 'debt.'")

Significantly, the Plaintiffs do not allege that they ever resided at the Subject Property, and instead merely allege that they "owned the real property." *See, generally,* Compl., ¶ 4. Nor do Plaintiffs allege they took out the Subject Loan to purchase the Subject Property as their primary residence. *See, generally, id.*

Moreover, in the event "judicially noticed facts contradict the allegations of the complaint, the allegations will not be accepted as true." *Garcia v. City of Chi.*, 1991 U.S. Dist. LEXIS 18966, at *2 (N.D. Ill. Dec. 23, 1991). Here, the Subject Mortgage – duly recorded with the Cook County Recorder of Deeds on January 4, 2010 as document number 1001940065 – clearly contains a 1-4 Family Rider ("Assignment of Rents") form, a form used for investment properties. *See* Subject Mortgage (Ex. A); *see e.g., Klahn*, 2013 U.S. Dist. LEXIS 103524, at *12 (noting that the "assignment of rents" evidenced the investment purpose of the mortgage loan); *Gonsalves-Carvalhal v. Aurora Bank, FSB*, Case No. 14-cv-151, 2016 U.S. LEXIS 13877, *19 (N.D. Ga. July 1, 2016) (in dismissing FDCPA claims noting that "the 1-4 Family Rider for Assignment of Rents Plaintiff executed as part of his Security Deed suggests that the property was intended to be used as rental property at the time of the transaction.") Further demonstrating that the Subject Property was never used as their residence, the correspondence from Seterus attached to the Complaint was not mailed to the Subject Property, but rather, was addressed to the Plaintiffs at 4115 West Lake Avenue, Glenview, Illinois which is presumptively the Plaintiffs' actual residence. *See* Correspondence dated February 15, 2016 (Ex. C to Compl.).

Contrary to Plaintiffs' conclusory allegations to the contrary, the Subject Loan is not a "debt" as defined by the FDCPA as it was for rental and investment purposes as demonstrated by the Subject Mortgage.

Accordingly, Plaintiffs' FDCPA claims against Seterus fail as a matter of law and should be dismissed with prejudice.

## II. Plaintiffs' Purported FCRA Claim Fails.

For their Complaint, Plaintiffs allege that Seterus violated Section 1681s-2(a)(1)(A) by purportedly reporting to the CRAs inaccurate information concerning the Subject Loan. *See* Compl., ¶ 35. This is entirely insufficient to support a claim under the FCRA.

As an initial matter, Plaintiffs' FCRA claim fails because there is no private cause of action arising under a violation of Section 1681s-2(a). *See Purcell v. Bank of Am.*, 659 F.3d 622, 623 (7th Cir. 2011); 15 U.S.C. § 1681s-2(c)(1) (explicitly excluding Section 1681s-2(a) from the private cause of action provisions found in Sections 1681n and 1681o). For this reason alone, the Plaintiffs' FCRA claim must be dismissed.

Moreover, although there is a private right of action under section 1681s-2(b), the

Complaint is entirely devoid of the requisite allegations to support a claim under that section of the FCRA.

In order to state a claim against a furnisher of credit information – such as Seterus – under section 1681s-2(b), a plaintiff must establish: (1) that he or she disputed an accuracy by notifying a CRA, (2) that the CRA contacted the furnisher to alert it to the dispute, and (3) that the furnisher failed to adequately investigate. *See Westra v. Credit Control of Pinellas*, 409 F.3d 825, 827 (7th Cir. 2005). Only after the furnisher is formally notified pursuant to section 1681i(a)(2) by a CRA of a consumer credit dispute, does a furnisher have any obligation to investigate the dispute. *Id., Gulley v. Pierce & Assocs., P.C.,* 436 Fed. Appx. 662, 665 (7th Cir. 2011); *Drew v. Equifax Info. Servs., LLC*, 690 F.3d 1100, 1106 (9th Cir. 2012). Consequently, in order to prove a claim under section 1681s-2(b), a plaintiff must first establish that he or she disputed an inaccuracy by notifying a CRA and that the CRA notified the furnisher of the dispute. *See e.g., Neiman v. Chase Bank, USA,* Case No. 13 C 8944, 2014 U.S. Dist. LEXIS 101553, *21 (N.D. Ill. July 25, 2014).

Here, Plaintiffs do not even allege they filed a credit dispute with any of the CRAs, let alone that Seterus received formal notice from a CRA triggering its obligation to investigate. *See generally,* Compl. Indeed, it appears from the allegations that the Plaintiffs never in fact disputed the credit reports with a CRA, and consequently, they do not have any cause of action against Seterus for a violation of FCRA. Therefore and notwithstanding the fact that Plaintiffs fail to allege a claim under Section 1681s-2(b), Plaintiffs' Complaint is woefully deficient to support any claim arising under the FCRA.

Accordingly, Plaintiffs' FCRA claims should be dismissed with prejudice pursuant to Rule 12(b)(6).

## III. Seterus is Entitled to an Award of Fees and Costs Due to the Vexatious Nature of the Claims Asserted.

Prior to filing this lawsuit, Plaintiffs knew or should have known that their alleged claims under the FDCPA and the FCRA were legally and factually without support. Indeed, the conclusory allegations in the Complaint that the Subject Loan was "made for personal, family, and household purposes" (Compl., ¶ 27) are demonstrably false under the widely accepted interpretation of those terms. Similarly, it is objectively unreasonable to assert claims under Section 1681s-2(a) when the statute explicitly excludes these parts from the private cause of action provisions of the FCRA. *See* 15 U.S.C. § 1681s-2(c).

Under these circumstances, not only should Plaintiffs' FDCPA and FCRA claims be dismissed, but the Court should award Seterus its fees and costs incurred in defending against these frivolous claims. Section 1692k(a)(3) of the FDCPA provides that the court "may award to the defendant attorney's fees reasonable in relation to the work expended and costs" to defend against FDCPA claims brought in bad faith and for the purpose of harassment. *See* 15 U.S.C. § 1692k(a)(3).

Similarly, 28 U.S.C. § 1927 provides that:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Sanctions are appropriate under § 1927 where an attorney "has 'acted in an objectively unreasonable manner by engaging in a 'serious and studied disregard for the orderly process of justice' … or ***where a 'claim [is] without a plausible legal or factual basis and lacking in justification.'"*** *Burda v. M. Ecker Co.*, 2 F.3d 769, 777 (7th Cir. 1993) (emphasis added) (*quoting Walter v. Fiorenzo,* 840 F.2d 427, 433 (7th Cir. 1988)).

Here, as outlined above, the claims asserted by the Plaintiffs under the FDCPA and the FCRA are entirely without any legal or factual support, and the artful attempts by Plaintiffs and their counsel to plead claims despite the obvious factual deficiencies is in itself indicative of an improper motive in bringing the present action.

Accordingly, an award of fees and costs in favor of Seterus is appropriate pursuant to Section 1692k of the FDCPA and Section 1927.

WHEREFORE, Seterus respectfully requests that that the Court dismiss the Complaint in its entirety with prejudice, award Seterus its reasonable attorneys' fees and costs in defending the present litigation, and provide such further relief as it deems just and proper.

Date: December 28, 2016

Respectfully submitted,

**SETERUS, INC.**,

By: /s/ Coleman J. Braun
One of Its Attorneys

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**Certificate of Service**

The undersigned attorney certifies that on **December 28, 2016**, he caused the service of a copy and any referenced exhibits via ECF on all parties who are Filing Users.

/s/ Coleman J. Braun